Office-Supreme Court, U.S.
FILED
MAY 18 1965
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1964.

No. 1004.

AIR DISPATCH, INC., NATIONAL FILM CARRIERS, INC., FILM CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. and AIR FREIGHT FORWARDERS ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

ARTHUR R. LITTLETON,
HAROLD S. SHERTZ,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa. 19109.
Attorneys for Appellants, Air Dispatch, Inc., National Film Carriers, Inc., and Film Carrier Conference.

Of Counsel:
MORGAN, LEWIS & BOCKIUS,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa. 19109

May 18, 1965.

International, 711 So. 50th St., Phila., Pa. 19143

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 1094.

AIR DISPATCH, INC., NATIONAL FILM CARRIERS, INC.; FILM CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND AIR FREIGHT FORWARDERS ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF IN OPPOSITION TO THE MOTIONS TO AFFIRM.

Many of the arguments raised in the Motions to Affirm filed herein have been answered in the Jurisdictional Statement and Supplement thereto. Appellants will therefore confine this brief to the arguments made by the appellees not covered at length heretofore.

The government initially raises the point that the appeal in this case is premature and collaterally that there

is no substantial question for consideration of this court at this time.

This is an appeal raising the question as to the validity of regulations by an independent agency. While the regulations can be characterized as only statements of future policy to be followed by the I. C. C. and it can be said that there has been no injury since the policy has not yet been put into effect, the regulations are no less prejudicial to the involved carriers. The regulations are specific and detailed and, since promulgated by the regulating body, they are manifestly the *decision* of that body.

As was said by this court in *Columbia Broadcasting System v. United States*, 316 U. S. 407, 422 (1942), in permitting a similar appeal, "The regulations are avowedly adopted in the exercise of [rule making] power", and "they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power."

Certainly, were these regulations now in effect, air freight forwarders would be ill-advised to purposely expend time and money in the investment of motor vehicles, advertising, solicitation and servicing beyond the scope of the regulations merely to create a case with which to test their validity, knowing the predetermined position of the regulatory agency.

An appealable "order" is not limited to an agency action which culminates in an adjudication, but is, in practical operation, appealable if it is, in effect, a rule-making decision which will govern the subsequent action of the regulated carriers.

In *Flemming v. Florida Citrus Exchange*, 358 U. S. 153, 168 (1958) an order of the Secretary of Health, Education and Welfare, "promulgated as a general rule, prospective in operation" was held to be a proper subject for court appeal even though there existed a temporary legislative stay of its operation.

Consequently, it is respectfully submitted that inasmuch as the I. C. C. regulations in question are prospective in nature and restrictive of the now existing *status quo*, the validity of such regulations is a proper question for this court.

The alternative is either to have air freight forwarders operate within the confines of the regulations without a test as to their validity or to expend time, effort and investment capital in the establishment of an operation which, if successful, *might* at some future unknown time cause a competitor (or the I. C. C.) to bring a complaint under the regulations and seek a cease and desist order.

It is unthinkable that the fundamental validity of these administrative regulations must abide the happening of such an undeterminable event and require the expenditure of untold dollars and hours by aggrieved parties.

The intervenors assume that the appellants would remove all motor transportation preceded or followed by transportation by aircraft from the sweep of the Interstate Commerce Act.

This is not an accurate statement of appellant's position. It was made clear in the opening paragraphs of the Jurisdictional Statement that the only transportation here involved was that performed under "through air bills of lading providing a bona fide pick up and delivery service by motor vehicle operating in a continuous movement in air-motor transportation."

While the verbal distinction is slight, there is an extensive difference between this and motor transportation preceded or followed by aircraft transportation.

Appellants are concerned only with the now asserted I. C. C. control over through air bill transportation performed by a C. A. B. authorized air carrier. Appellants have not and do not argue the extreme, that motor transportation from Chicago to Philadelphia followed by air transportation to Newark would come under C. A. B. au-

thority, *unless* such transportation is performed by a C. A. B. approved carrier on a through air bill. While it is highly unlikely that any such authorization would be granted by the C. A. B., if *granted*, the proper forum for protests or examination of the grant is the C. A. B. and appeal procedure thereunder and not an independent hearing before the I. C. C.

The government's Motion to Affirm flatly states that the Interstate Commerce Act places primary responsibility upon the Commission for the regulation of interstate motor carriage and that C. A. B. has a "limited sphere" of jurisdiction over surface transportation performed in connection with air transportation.

These mere conclusions do not answer the extensive arguments raised in the Jurisdictional Statement concerning the limitation of I. C. C. jurisdiction over motor vehicle transportation "partly by rail, express or water". These assertions are no response to the demonstrated legislative intent that the C. A. B. is to exclusively control and regulate "air transportation" and all its many facets.

It is clear that while the Commission has the right to initially interpret the exclusion created by Section 203 (b)(7a), it does not have the right or the power to interpret this exclusionary language as giving it control over motor transportation by a C. A. B. approved air carrier to which C. A. B. control is *subordinate*.

The mere fact that the C. A. B. agrees that the I. C. C. has the right to so construe the exclusion is of little force since it is a basic concept of administrative law that an agency cannot surrender, transfer or otherwise fail to exercise the jurisdiction given to it by the legislature, particularly in favor of another agency's exercise of such jurisdiction.

To maintain the delineation between regulation of motor carriers and air carriers the Congress injected complimentary exclusions and inclusions in the two Acts.

In the Motor Carrier Act it *excluded* transportation partly by motor carriers and partly by aircraft, by limiting the jurisdiction to that partly by motor vehicle and partly by rail, express or water. On the other hand it *extended* to C. A. B. jurisdiction over transportation partly by aircraft and partly by other modes of transportation without limitation.

Section 203(b)(7a) was made part of the Interstate Commerce Act by Section 1107(j) of the Civil Aeronautics Act of 1938. The only realistic interpretation can be the intent to exclude I. C. C. from exercising powers solely granted by the Act to C. A. B.

The Motions to Affirm lay some stress on the fact that the Commission has had reserved to it the *express* authority over "qualifications and maximum hours of service of employees and safety of operation or standards of equipment" of motor carriers, including motor carriers providing service incidental to transportation by aircraft.

Appellants' argument is not inconsistent with this express authority as such authority extends to all interstate motor vehicle transportation, whether by common, contract or private carriage. All must concede that the Commission has absolutely no authority to regulate private interstate commercial traffic and yet, the Commission retains control over the qualification and maximum hours of service within such private transportation.[1]

The private carrier is a prime example of the fact that there can be excluded from the Commission's regulatory power great areas of interstate motor vehicle transportation without such exclusion being inconsistent with the qualification and maximum hours provision of the Interstate Commerce Act. Certainly if all private carriage can be and is so excluded, the small portion of total interstate traffic moving by motor vehicle under a through air bill of lading can be excluded and yet control over the safety factors be retained by the Commission.

---

1. 49 U. S. C. A. § 204(a)(3).

The Motions to Affirm seek to obscure the issue by seeking to differentiate between motor transportation "incidental to transportation by aircraft" and "services in connection with air transportation".

Actually the two terms are synonymous. This is true both practically and as a matter of statutory construction.

The order,[2] sets forth the C. A. B. regulations relative to the filing of tariffs by air carriers so as to prescribe air cargo pickup and delivery zones. Section 222.3(d) [3] makes the test of filing such tariffs by air carriers the finding that the proposed tariffs involve service in connection with air transportation.

This is in conformity with the statutory authority of Section 403 that every air carrier shall file tariffs showing rates "in connection with such air transportation." C. A. B. in its order found [4] bona fide collection and delivery by motor vehicle to be necessary for it to carry out the legislative policy to encourage and develop air transportation adapted to the present and future needs of the commerce of the United States.

The Commission in the *Kenney* case (which the order is said to confirm) found that bona fide collection and delivery service in connection with a through and continuous movement under the air bill of lading of an air carrier, within the area shown by tariff for such service on file with C. A. B., was incidental to transportation by aircraft.

The lower court reached the same conclusion and found that the transportation here in question was an integral part of air transportation.[5]

There appears to be some difference in opinion between the intervenors and the United States as to the effect of

---

2. Page 37a of Jurisdictional Statement.
3. Page 39a of Jurisdictional Statement.
4. At page 30 of Intervenors' Motion to Affirm.
5. Page 2a of Jurisdictional Statement, 2nd full paragraph.

Section 1003 of the Federal Aviation Act. The government argues that the appellants' position makes "nonsense" of this section since that section provides the desired joint C. A. B.-I. C. C. regulation.

That this section is not the clear panacea for the basic problem raised in this appeal is evident from the position taken by the intervenors that the casual suggestion of the District Court as to the applicability of the section was in error.

The proposals of the I. C. C. in its annual report to Congress in 1964 and statements by C. A. B. officials that this section should be strengthened and amended so as to clearly be available to handle problems of service between the two agencies further illustrate our point. In fact, the chairman of the two agencies here involved are co-sponsors of legislation to create joint boards as clearing houses for overlapping activities between the various independent agencies.

The intervenors admit that conflicts between the C. A. B. and the I. C. C. may arise under the proposed regulations but argue that only when these conflicts arise should there be any judicial determination.

The intervenors further point out that there is nothing unusual in the division of authority between two agencies. It is *most unusual*, however, for two such agencies to divide authority by creating blatantly overlapping areas of regulation, as was done here, by the Commission reserving unto itself the right to cancel, on its own motion, at an indefinite future time, previously granted C. A. B. authority.

It is impractical and prejudicial to demand that obvious areas of conflict not be clarified or removed except upon the expenditure of time and money in the development of a service which *might* later be held illegal by one agency while having received the stamp of approval by another.

To allow such a sword of Damocle's to exist and obviously restrict the proper expansion of the needed air freight industry was not contemplated by Congress and should

not be permitted to exist to impede the national transportation program.

For the above reasons and because of the reasons detailed in the Jurisdictional Statement, Appellants respectfully submit that probable jurisdiction should be noted.

Respectfully submitted,

ARTHUR R. LITTLETON,
HAROLD S. SHERTZ,
Attorneys for Appellants Air Dispatch, Inc., National Film Carriers, Inc. and Film Carrier Conference.

Of Counsel:

MORGAN, LEWIS & BOCKIUS.